No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL PERALES,
*Petitioner*

v.

UNITED STATES OF AMERICA,
*Respondent*

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Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether parties to a criminal action must lodge a separate objection to the failure of a district court to address substantial arguments for a different sentence, or whether the request for a different sentence, together with the grounds proffered therefor, preserves error?

II. Whether 18 U.S.C. §2113(a) is divisible for purposes of categorical analysis?

Subsidiary question: whether this Petition should be held in light of *United States v. Davis*, __U.S.__, 139 S.Ct. 782 (Certiorari Granted January 4, 2019)(18-431).

## PARTIES

Michael Perales is the Petitioner; he was the defendant-appellant below.

The United States of America is the Respondent; it was the plaintiff-appellee below.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Perales respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Perales*, No. 18-10140, 747 Fed. Appx. 258 (5TH Cir. January 9, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A].

## JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on December 12, 2018. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND GUIDELINES INVOLVED

Section 3553(a) of Title 18 provides:

> (a)Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Federal Sentencing Guideline 4B1.2(a) provides:

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

## STATEMENT OF THE CASE

Michael Perales, who suffers from untreated, metastatic cancer, was caught selling stolen firearms. He traded them for marijuana, which he used to treat the pain arising from his illness. Because he has a criminal record, the government obtained an indictment against him for violating 18 U.S.C. §922(g). He pleaded guilty but did not waive appeal.

A Presentence Report determined that his Guideline range should be 77-96 months imprisonment, run consecutively to any sentence later imposed for violation of a prior term of supervised release. This range stemmed largely from a six level base offense level for a prior "crime of violence." In particular, Petitioner had been convicted of violating 18 U.S.C. §2113(a), the federal bank robbery statute. An indictment from that case alleged that he took money from the bank by force, violence, and intimidation.

At sentencing, defense counsel urged a sentence at the bottom of the Guidelines, in light of the defendant's untreated cancer and its spread to his urinary tract. The district court did not address this issue in any way, and summarily imposed a sentence at the top of the Guideline range: 96 months imprisonment. By way of explanation for the term of imprisonment, the court gave only its standard 14 words:

> I believe this sentence does adequately address the sentencing objectives of punishment and deterrence.

Petitioner appealed, arguing first that the district court's failure to address meaningfully his compelling argument in mitigation – cancer – rendered the sentence procedurally unreasonable. He conceded that he'd offered no objection below, but argued that error was preserved by his request for a lesser sentence in light of that particular mitigating circumstance. To preserve review, he also

contended that the district court had plainly erred in treating his prior conviction under 18 U.S.C. §2113(a) as a "crime of violence." Among other contentions not pressed here, Petitioner maintained that the two paragraphs of §2113(a), criminalizing bank robbery and entry to a bank with intent to commit a felony, respectively, are not divisible for the purposes of categorical analysis.

The court of appeals affirmed. It first held that an objection is necessary to preserve error in a district court's failure to respond to arguments in mitigation. [Appx B]. Applying the plain error standard for unpreserved claims of error, it held that "Perales has not shown a clear or obvious error with respect to the adequacy of the reasons," and that "he has not shown that the alleged error affected his substantial rights, because he has not established that a more thorough explanation would have resulted in a lower sentence." [Appx B.][citing *Puckett v. United States*, 556 U.S. 129, 135 (2009)]. It summarily rejected the crime of violence challenge as foreclosed by *United States v. Brewer*, 848 F.3d 711 (5th Cir. 2017). *See* [Appx. B].

## REASONS FOR GRANTING THE WRIT

**I. This Court should grant certiorari to resolve the apparent conflict between the Fifth Circuit and this Court's decision in *Chavez-Meza v. United States*, __U.S.__, 138 S.Ct. 1959 (2018), as a well as a split in circuit authority regarding the standard of review when a district court fails to address arguments of counsel in mitigation of sentencing.**

Prior to *United States v. Booker*, 543 U.S. 220 (2005), federal sentences were in most cases determined by application of sentencing Guidelines. See 18 U.S.C. §3553(b)(1). In most cases, then, the rationale for the district court's selection of sentence was elucidated by its formal rulings on Guideline objections. *See* Fed. R. Crim. P. 32(i)(B). *Booker*, however, rendered the Guidelines advisory, and substituted the open-ended factors of 18 U.S.C. §3553(a). *See Booker*, 543 U.S. at 259. It follows that after *Booker* a district court's formal selection of a Guideline range will not fully explain its choice of sentence. This Court has emphasized that explanation of a defendant's sentence is an essential component of a system of advisory Guidelines.

It stressed in *Rita v. United States*, 551 U.S. 338 (2007) that:

> [t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision making authority. *See, e.g., United States v. Taylor*, 487 U.S. 326, 336-337, 108 S. Ct. 2413, 101 L. Ed. 2d 297 (1988). Nonetheless, when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical. Unless a party contests the Guidelines sentence generally under § 3553(a) –that is, argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way–or argues for departure, the judge normally need say no more. *Cf.* § 3553(c)(2) (2000 ed., Supp. IV). (Although, often at sentencing a judge will speak at length to a defendant, and this practice may indeed serve a salutary purpose.)

*Rita v. United States*, 551 U.S. 338, 356-357 (2007).

Indeed, it noted two particular circumstances where more extensive explanation for the sentence will be required. Such explanation is necessary when the sentence falls outside the Guideline range, or when the court rejects non-frivolous arguments for a sentence outside the range:

> Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments. Sometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation. Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so.

*Rita,* 551 U.S. at 356-357.

*Chavez-Meza v. United States*, 138 S.Ct. 1959 (2018), applied the requirement of sentence explanation to reductions under 18 U.S.C. §3582(c). In *Chavez-Meza*, the district court reduced a drug defendant's sentence to the middle of his reduced Guidelines, following a retroactive Guideline Amendment. *See Chavez-Meza*, 138 S.Ct. at 1964. The court did so on a pre-printed form, which Chavez-Meza argued to be inadequate. *See id*. This Court held that reviewing courts could look to the explanation provided at the original sentencing to determine the basis for the sentence ultimately imposed. *See id*. at 1965. Finding that original explanation adequate, this Court affirmed the sentence. *See id.*

Significantly, however, this Court offered plenary review of the defendant's failure-to-explain claim, even though there is no evidence that Chavez-Meza ever objected to the procedural reasonableness of the sentence. *See id.*; *see also United States v. Chavez-Meza*, 854 F.3d 655 (10th Cir. 2017); Brief for the Petitioner in *Chavez-Meza v. United States*, No. 17-5639, 2018 WL 1709088, at *3-6 (Filed March 26, 2018)(detailing the case's factual background); Brief for the Respondent in *Chavez-Meza v. United States,* No. 17-5639, 2018 WL 1709089, at *2-8 (Filed March 28, 2018)(same).

In the case at bar, the Fifth Circuit held that such claims could be reviewed only for plain error in the absence of explicit objection. *See* [Appx. B]. That position is refuted by this Court's treatment of the claim in *Chavez-Meza*, which comports with well-reasoned decisions of the Fourth and Seventh Circuits. *See United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010) ("By drawing arguments from § 3553 for a sentence different than the one ultimately imposed, an aggrieved party sufficiently alerts the district court of its responsibility to render an individualized explanation addressing those arguments, and thus preserves its claim."); *United States v. Cunningham*, 429 F.3d 673, 675-680 (7th Cir. 2005)(Posner, J.) (offering plenary review, and relief, to a district court's failure to address a defendant's arguments in mitigation). Notably, the court below did not state that the result would be the same under plenary review.

This Court has held that more extensive explanation may be necessary when the parties offer non-frivolous reasons for a sentence outside the range. That proposition was reaffirmed in *Chavez-Meza* itself. *See Chavez-Meza*, 138 S.Ct. at 1965 (citing *Rita*, 551 U.S. at 357). The reasons offered by Petitioner in district court for a lesser sentence were hardly frivolous. To the contrary, they were unusually compelling: counsel urged the court to consider the defendant's untreated cancer, which had spread into his urinary tract. The notion that a defendant with this ailment might appropriately receive a lesser sentence is well-supported by empathy, common-sense, and the Sentencing Guidelines. *See* USSG §5H1.4 ("An extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment."). To the extent that cancer affects the defendant's average life expectancy, it affects the relative severity of the sentence, and the likelihood of recidivism, both directly relevant to 18 U.S.C. §3553(a).

Yet the district court did not address the arguments for a lesser sentence of imprisonment. Indeed, the district court offered only the same[1] 14 words – rote recitation of two statutory factors – it routinely utters in explanation of very nearly every sentence: "I believe this sentence does adequately address the sentencing objectives of punishment and deterrence." This lies, to the say least, at the border of adequacy. *Cf. United States v. Grier*, 475 F.3d 556, 571 (3rd Cir. 2007)(en banc)(remanding for inadequate explanation where the district court said simply "'[t]he Court believes that 100 months is reasonable in view of the considerations of section 3553(a).'"). In the absence of a plain error standard – dispensed with by *Chavez-Meza* – Petitioner was reasonably likely to prevail.

In any event, *certiorari* should be granted to resolve the split in the circuits and the conflict with the holding by this Court in *Chavez-Mesa*, so the proper standard of appellate review can be determined for the failure of the district court to address mitigation arguments on behalf of the defendant at sentencing.

**II. There is a reasonable probability of a different result in the event that this Court decides in *United States v. Davis*, __U.S.__, 139 S.Ct. 782 (Certiorari Granted January 4, 2019)(18-431), that a similar statute is not divisible for the purposes of categorical analysis.**

Guideline 2K2.1 provides for an enhanced base offense level when the defendant has

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1 *See e.g.* Appellant's Initial Brief in *United States v. Garcia*, 17-10979, 2017 WL 6554684, at *4 (5th Cir. Filed, December 22, 2017); Appellee's Brief in *United States v. Lopez-Mata*, No. 13-11321, 2014 WL 1409805, at *4 (5th Cir. Filed April 7, 2014); Appellant's Initial Brief in *United States v. Huerra*, No. 16-11783, 2017 WL 2832709, at *11 (5th Cir. Filed June 22, 2017)(life sentence); Appellee's Initial Brief in *United States v. Rodriguez*, No. 07-10535, 2007 WL 5356752, at *5 (5th Cir. Filed October 9, 2007); Appellant's Initial Brief in *United States v. Ruiz-Govea*, 15-10540, 2016 WL 930205, at *8 (5th Cir. Filed May 7, 2016); Appellant's Initial Brief in *United States v. Berrones-Vargas*, No. 15-10257, 2015 WL 3755125, at *4 (5th Cir. Filed June 10, 2015); Appellant's Initial Brief in *United States v. Diaz-Hernandez*, No. 14-11340, 2015 WL 1814665, at *5 (5th Cir. Filed, April 15, 2015).

sustained a prior conviction for a felony "crime of violence." USSG §2K2.1(a)(4)(A). The Guideline incorporates the definition of "crime of violence" found at USSG §4B1.2. *See* USSG §2K2.1, comment. (n.1). That definition reads as follows:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that–
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

USSG §4B1.2(a).

The court below has held that violations of the first paragraph of 18 U.S.C. §2113(a) – federal bank robbery – have force as an element, and hence qualify as "crimes of violence." *See United States v. Brewer*, 848 F.3d 711 (5th Cir. 2017). Violations of the second paragraph, however, plainly do not satisfy this definition. Nothing about the mere entry of a bank with felonious intent necessarily involves the use, threatened use, or attempted use of force against another. Nor can it be considered "robbery," in the generic sense, which requires, at the very least, an effort to obtain property. *See United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006)("… the generic form of robbery 'may be thought of as aggravated larceny,' containing at least the elements of 'misappropriation of property under circumstances involving [immediate] danger to the person.'")(quoting WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 20.3 intro., (d)(2) (2d ed. 2003)). Indeed, the court below has held that the second paragraph of §2113(a) does not qualify as a "crime of violence" under §4B1.2. *See United States v. Dentler*, 492 F.3d 306, 313 (5th Cir. 2007).

The question thus becomes whether §2113(a) may be subdivided into its first and second paragraphs when determining whether it qualifies for a criminal history enhancement. *See Mathis v. United States*, __U.S.__, 136 S.Ct. 2243 (2016). A very similar issue may arise in *United States v. Davis*, __U.S.__, 139 S.Ct. 782 (Certiorari Granted January 4, 2019)(18-431). In *Davis*, this Court will decide whether the Respondents may be convicted of using or possessing a firearm in connection with a crime of violence under 18 U.S.C. §924(c) for possessing a firearm during conspiracies to commit robbery under 18 U.S.C. §1951(a) (the Hobbs Act).

Chiefly, the parties in *Davis* dispute whether the portion of the definition of "crime of violence" found in 18 U.S.C. §924(c)(3)(B) should be evaluated based on the defendant's conduct or based on the elements of the offense statute he or she violated. Plausibly, however, this Court may decide that an offense constitutes a "crime of violence" under 18 U.S.C. §924(c)(3)(B) only if all instances of the offense involves a substantial risk that force will be used against the person or property of another. *See Sessions v. Dimaya*, ___U.S.___, 138 S.Ct. 1204 (2018)(Gorsuch, J., concurring)(suggesting, in connection with 18 U.S.C. §16(b), which is identically worded to 18 U.S.C. §924(c)(3)(B), that "[w]e might also have to consider an interpretation that would have courts ask not whether the alien's crime of conviction ordinarily involves a risk of physical force, or whether the defendant's particular crime involved such a risk, but whether the defendant's crime of conviction always does so.")

In the event that the Court is required to ask whether conspiracy to commit Hobbs Act Robbery under 18 U.S.C. §1951(a) always poses a risk of force, it will also be necessary to determine whether violations of §1951(a) are subdivisible. Plainly, not all violations of §1951(a) pose a risk of the use of force – the statute may be violated by conspiring to extort another under color of law, and

conspiring to demand a bribe on pain of unlawful regulatory attention is not a "crime of violence." 18 U.S.C. §1951(b)(2).

And this divisibility analysis of §1951(a) is likely to provide dispositive guidance to §2113(a), the prior statute of conviction at issue here. Both statutes specify alternative means by which the statute may be violated, some of which (at least arguably) satisfy the relevant definition of "crime of violence," and some of which plainly do not. Both statutes place the qualifying and non-qualifying alternatives in the same numbered Subsection, and neither specifies distinct punishments for these two kinds of alternatives. ***Compare*** 18 U.S.C. §1951(a) ***with*** §2113. Further, neither statute seems to have given rise to a clear decision from this Court on the question of whether conviction requires jury unanimity as to which alternative was violated by the defendant. As such, §1951(a) with §2113 present closely approximate cases for divisibility under *Mathis v. United States*, __U.S.__,136 S.Ct. 2243 (2016). *See Mathis*, 136 S.Ct. at 2256.

*Davis* thus stands to reveal clear error in the district court's classification of federal bank robbery as a "crime of violence." This Court "regularly hold(s) cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." *Lawrence v. Chater*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting). Ultimately, GVR is appropriate if the decision "reveal(s) a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation…" *Lawrence*, 516 U.S. at 167. In the event that *Davis* reaches the divisibility of §1951(a) and decides in favor of the Respondents, it is reasonably

probable that the outcome will reveal plain error in this case, and a significantly elevated Guideline range.

## Conclusion

Petitioner respectfully prays that this Honorable Court grant *certiorari*, and reverse the judgment below, and/or vacate the judgment and remand for reconsideration in light of *Davis*.

Respectfully submitted this 9th day of April, 2019.

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